NAWAB MAJOR SIR MOHAMED AKBAR KHAN v. ATTAR SINGH & ORS.

[P.C. (Lords Blanesburgh and Atkin, Sir Lancelot Sanderson, Sir Shadi Lal and Sir George Rankin) April 6, 1936]

[Privy Council Appeal No. 62 of 1933]

Negotiable instruments — Document — Acknowledgment of receipt — Repayment within 2 years — Rate of interest specifically mentioned — Whether a promissory note — Admission of parol evidence — Indian Negotiable Instruments Act (1881), s.4; Indian Evidence Act, ss.91 and 92.

An instrument was in the following form:—

"May God protect us.

This (one) receipt is hereby executed by Bhai Hira Singh and Attar Singh Kharbanda, residents of Hoti for Rs. 43,900 (forty-three thousand and nine hundred rupees) half of which amount comes to twenty-one thousand nine hundred and fifty, received from the firm of Lala Duni Chand Lala Hari Chand Sethi for and on behalf of Captain Muhammad Akbar Khan of Hoti. This amount to be payable after 2 (two) years. Interest at the rate of Rs. 5. 4. 0 (Rs. five annas four) per cent. per year to be charged.

Dated this 20th day of *Chetar* (first month of the Hindu Calendar year) *Sambat* 1974 corresponding to April 1, 1917.

Stamp has been duly affixed.

(*Sd.*) Hira Singh, Kharbanda.

(*Sd.*) Attar Singh, Kharbanda."

Held: that the document was not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. The document in question was a receipt containing the terms on which it was to be repaid and being primarily a receipt, even if coupled with a promise, it was not a promissory note.

Mortgage Insurance Company v. *Commissioners of Inland Revenue,* (1888) 21 Q.B.D. 352 followed.

Manick Chand v. *Joomoona Doss,* (1880) I.L.R. 8 Cal. 645 overruled.

Held further: that the document did not record or purport to record all the terms of the contract between the parties. There was nothing in the document explaining how the money came to be received; nothing to prevent the parties from showing that it was paid by way of loan, deposit, or on account of some joint venture. The only terms which the document expressed were as to the date of repayment of the money expressed to be received and as to the rate of interest. These terms the defendants did not seek to contradict, vary, add to or subtract from and hence it could not be said that under sections 91 and 92 of the Evidence Act, no oral evidence was admissible, to contradict, vary, add to or subtract from, its terms.

PRIVY COUNCIL — Appeal from Court of Judicial Commissioner, N.W.F. Province, India.

W. H. Upjohn, K. C. Wallach and *J. M. Pringle* for the appellant.

L. De Gruyther, K.C. and *H. Rashid* for the respondents.

Cur. Adv. Vult.

The judgment of the Board was delivered by —

Lord Atkin: This is an appeal from a decision of the Court of the Judicial Commissioner, N.W. Frontier Province, allowing an [168] appeal from the subordinate Judge of Mardan who had made a decree in favour of the plaintiff. By the decree on appeal the plaintiff's suit was dismissed with costs.

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The suit was commenced by a plaint dated July 25, 1929, based upon a deposit receipt dated April 1, 1917, to recover the principal sum of Rs. 43,900 said to have been deposited with the defendants on deposit account with interest at the agreed rate of 5¼ per cent. per annum. The alleged deposit receipt bore only an affixed stamp of 1 anna, and the subordinate Judge in framing the issues stated as the first issue the question whether the document fell within the definition of a promissory note and was it, therefore, not admissible in evidence. Without hearing any evidence as to the circumstances in which the document came into existence, he decided this issue as a preliminary point in favour of the defendants, holding that the document was a promissory note, was improperly stamped, and therefore, was inadmissible in evidence for any purpose under section 35 of the Indian Stamp Act. Their Lordships will discuss this decision later. Leave, however, was given to the plaintiff to amend: and on January 2, 1931, the plaintiff presented an amended plaint alleging that on April 1, 1917, it was agreed between the plaintiff and defendants that the plaintiff should deposit Rs. 43,900, with the defendants for a period of two years with interest at 5¼ per cent. per annum: and that at the expiration of two years the amount was allowed to remain in deposit with the defendants on the condition that the plaintiff would be at liberty to recover the amount with interest at any time he liked, and that interest would be credited annually in the books of the defendants. The defendants in their respective written statements denied that there was any agreement apart from that recorded in the inadmissible promissory note. They denied any agreement in 1919, they pleaded the Statute of Limitations and finally pleaded that they had repaid the money in 1919. Further issues were raised as to the liability of some of the defendants as members of the alleged joint Hindu family as members of which they were sued. As to these issues no question now arises before their Lordships. The subordinate Judge does not appear to have thought it necessary to frame a new issue to meet the allegation in the amended pleadings of the agreement made in 1919. He heard the evidence on both sides and eventually gave judgment for the plaintiff. The plaintiff's evidence was that when his father died in 1914 he had Rs. 25,000 deposited with the defendants which he the plaintiff had withdrawn in 1914, and had afterwards re-deposited in 1916 while he was engaged in the war. On his return from the war in 1917 he wished to deposit with the defendants whom he knew to be a very reliable firm of money-lenders a further sum of Rs. 50,000. He sent for the two principal defendants, father and son, and told them he wished to deposit with them the sum named. They said they could not take so large a sum and could invest only Rs. 43,900 in a certain business. They asked him not to fix the interest higher than 7 annas, i.e. 5¼ per cent. per annum (the interest on the Rs. 25,000 had been 6 per cent.). "They said they could not repay me the money within two years: after that they would re-pay me at any time on demand after receiving due notice." He sent his accountant Abdulla with them to his regular bankers Duni Chand Hari

Chand who conducted all his receipts and disbursements. Later Abdulla handed him the receipt in question, which admittedly was prepared by the defendants. The plaintiff then proceeded to give evidence as to the 1919 transaction. He said that he was on duty as a martial law commander near Lahore in April, 1919: and that on April 21, or 22 on hearing of the death of his uncle he came home to Hoti on leave. While there the defendants, the father and possibly the son, came to him. They said that the two years had elapsed. "They asked what should be done about the money. I told them I did not then want to withdraw that money and would like to keep it with them as the times were uncertain. I told them to credit the interest and pay it to me when I wanted it. They agreed to this." Before the trial the defendant Hira Singh had died, a very old man. The son Attar Singh said that in 1917 he had taken some land on mortgage from one Hamish Gul. He, Hamish Gul, had acquired the land by pre-emption and Rs. 42,500 had to be deposited as pre-emption money, which was found by the defendant Attar Singh. He took a loan from the plaintiff for Rs. 43,900 at 5¼ per cent. interest: wrote a promissory note for this and gave it to the plaintiff himself. No mention was made of the money being placed on deposit. He made no agreement with the plaintiff after the expiration of two years to keep the money on deposit. After two years he repaid the money and the interest. His father and he both went to the plaintiff and his father paid the money.

The defendants' story about the payment of the money was not accepted by either of the Courts in India. The absence of any receipt, the non-return of the alleged promissory note, and the failure by the defendants to produce any books dealing with the
[169] transaction amply support the [169] finding of the trial Judge in this respect. The defence therefore had to rest upon the Limitation Act, a defence meritorious enough where the defendant has been left in long enjoyment of property: or wherefrom the lapse of time the original existence or the discharge of an obligation is left in doubt but void of all merit where, as here an original obligation is admitted and fictitious discharge is falsely alleged. Nevertheless it must be carefully examined, and the plaintiff's rights determined accordingly. The articles of the Limitation Act which are relevant are:

"59. For money lent under an agreement that it shall be payable on demand: Three years from the time when the loan was made.

60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable: Three years from the time when the demand is made. To which should be added article 120, suit for which no period of limitation is provided elsewhere than in this schedule: Six years from the time when the right to sue accrues."

It is, therefore, necessary to determine whether this was money lent by the plaintiff to the defendants: or whether it was deposited under an agreement that it should be payable on demand. An attempt was made by the plaintiff to establish that the money was deposited with the defendants as bankers payable on demand. The trial Judge accepted this view, but their Lordships are not prepared to differ from the Judicial Commissioner's Court in this respect. That the defendants were money-lenders is admitted, but there is no satisfactory evidence that they carried on business as bankers, or indeed how such business is carried on in the North-West Frontier Province: and in the absence of such evidence, it would be unsafe to affirm the trial Judge's finding. Was this then a loan or was it a deposit payable on demand? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker, it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to repay. It is unnecessary, however, in this case to decide any question as to implied conditions, for the case of the plaintiff rests on an express stipulation made in 1919.

Before however coming to a final decision as to the rights of the parties, it seems necessary to discuss the point decided by the trial Judge that the document signed by the defendants in 1917 was a promissory note and inadmissible because improperly stamped. No objection to this ruling appears to have been taken on the hearing of the appeal: but their Lordships thought right to allow the point to be raised before them, as it involves no question of fact: on the other hand the determination of the issue as to whether any and what agreement was made in 1919 is much embarrassed by the Court having to deal with a fund as it were *in vacuo*, with no evidence admissible as to how there came to be any sum in the hands of the defendants at that date.

Having heard the discussion their Lordships have come to the conclusion that the document was not a promissory note. The Indian Stamp Act does not suffer from the defect of the English Stamp Act in ignoring the definitions in the Bills of Exchange Act, 1882, and enacting a definition of its own. The Indian Act, Article 49 imposes a duty on "promissory notes" as defined by section 2(22) and by that sub-section "Promissory Note" means a promissory note as defined by the Negotiable Instruments Act, 1881.

By the latter Act, section 4(a) "promissory note" is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. There follow illustrations lettered (a) to (h) of which three only need be set out.

"*A.* signs instruments in the following terms:—

(a) I promise to pay *B*, or order Rs. 500.

(b) I acknowledge myself to be indebted to *B.* in Rs. 1,000 to be paid on demand, for value received.

(c) Mr. *B.* I.O.U. Rs. 1,000

[170] [170] The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c) are not promissory notes."

It is necessary to refer to section 13: "A negotiable instrument means a promissory note.....payable either to order or to bearer."

"Explanation. — A promissory note.....is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not convey words prohibiting transfer or indicating an intention that it shall not be transferable."

The instrument in question in this case is according to the authorised translation in the following terms:—

"May God protect us.

This (one) receipt is heerby executed by Bhai Hira Singh Attar Singh Kharbanda, residents of Hoti for Rs. 43,900 (forty-three thousand and nine hundred rupees) half of which amount comes to twenty-one thousand nine hundred rupees) half of which amount of Lala Duni Chand Lala Hari Chand Sethi for and on behalf of Captain Muhammad Akbar Khan of Hoti. This amount to be payable after 2 (two) years. Interest at the rate of Rs. 5.4.0 (Rs. five annas four) per cent. per year to be charged.

Dated this 20th day of *Chetar* (first month of the Hindu Calendar year) *Sambat* 1974 corresponding to April 1, 1917.

Stamp has been duly affixed.

(*Sd.*) Hira Singh, Kharbanda.
(*Sd.*) Attar Singh, Kharbanda."

If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, for the third illustration indicates that an I.O.U. is not a promissory note though of the implied promise to pay there can be no doubt. The second illustration, however, seems to show that the express words "I promise" or "I undertake" are unnecessary. The form of words is taken from an early English case, *Casborne* v. *Dutton* reported in Selwyn's N.P. 11th ed., p. 401 from Scacc. M.I. Geo. II MSS. where according to the learned author the Court stated that the words "to be paid" in the document there sued on amounted to a promise to pay observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced moneylenders did not draw it on paper with an impressed stamp as they would have had to if the document were a promissory note and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to pay it is not a promissory note. This view of the meaning of a promissory note appears to coincide with the grounds of decision in *Mortgage Insurance Company* v. *Commissioners of Inland Revenue*, (1888) 21 Q.B.D. 352; 57 L.J.Q.B. 630; 36 W.R. 833, where the English Court of Appeal found themselves bound to give a restricted meaning to the much wider definition in the English Stamp Act. It will have the effect of overruling some decisions in the Indian Courts notably the case of *Manick Chand* v. *Jomoona Doss*, (1880) 8 Cal. 645, where the defendant had given a sale note to his customer recording a re-sale to him of certain rupee paper previously bought from the customer, and bringing out a difference expressed to be payable on a day in the next month. The document was a sale note coupled with an account, [171] and in [171] no way resembled a promissory note, or anything capable of being a negotiable instrument. Once it is decided that the document has not to be stamped as a promissory note, their Lordships are not called upon to decide whether the document otherwise bears a sufficient stamp. If that question had been raised it is sufficient to say that if improperly stamped, it could have been stamped after execution under a penalty.

The further objection to the admissibility of the document was that it recorded the terms of a contract reduced to the form of this document and that under sections 91 and 92 of the Evidence Act no oral evidence was admissible to contradict, vary, add to, or subtract from its terms. The answer is that the document does not record or purport to record all the terms of the contract between the parties. There is nothing in the document which explains how the money came to be received: and nothing to prevent the parties from showing that it was paid by way of loan deposit, or on account of some joint adventure. The use of the money might have been limited in various ways. The only terms which the document does express are as to the date of repayment of the money expressed to be received and as to the rate of interest. These terms the defendants do not now seek to contradict, vary, add to or subtract from. The Board, therefore, can proceed to examine the evidence untrammelled by the restriction imposed upon themselves unnecessarily as now appears by the Courts below of having to disregard the receipt or evidence as to the actual transaction in 1917. Their Lordships see no reason for rejecting the plaintiff's evidence as to this which seems to be supported by evidence as to a former and, as he says, similar transaction entered into by both his father and himself as to Rs. 25,000. But it has to be remembered that the transaction in 1917 assuming it to have been a deposit was not a deposit payable on demand. The receipt shows that it was payable after the expiration of two years. Without deciding the

point their Lordships prefer to assume that the evidence given by the plaintiff that it was also stipulated in 1917 that if not paid in two years it was to remain payable on demand should be rejected as inconsistent with the express terms of the document: and they are not prepared to find that there was an implied term that it should be so payable.

The real question in the case is whether there was any agreement made in 1919, and if so, whether the plaintiff has established the agreement alleged by him. The outstanding fact is that after 1919 no interest was in fact paid nor was any claim made to have the principal repaid until at the earliest 1925. Obviously some explanation is required. The defendants supplied a plain tale. .The principal and interest were repaid at the due date. This unfortunately is untrue. The plaintiff's explanation is the alleged agreement in 1919 that the money and interest were to remain on deposit with the defendants payable on demand. It is uncontradicted save by a story which is shown to be false. In these circumstances it would appear that the real question for the tribunal of fact is whether there are inherent improbabilities or extrinsic facts justifying the Court in rejecting the plaintiff's account. Their Lordships do not find that there are. The Court of the Judicial Commissioner quite rightly commented upon the fact that three witnesses were called on the plaintiff's behalf at an early stage of the trial to support the agreements in 1917 and 1919, as alleged in the statement of claim a different set of three for each transaction. One of the last three obviously confused the story of 1919 with that of 1917: the evidence of all six has been treated as unreliable: and their Lordships do not dissent from this view.

The plaintiff must suffer the necessary disadvantage which attaches to any party who seeks to support his case in a Court of justice with unreliable evidence. And if it could be shown that he knowingly suborned false witnesses there could be no doubt as to the result of his claim. But no evidence nor any cross-examination was directed against the plaintiff in this respect, and in his evidence he makes no reference to corroborative witnesses being present. It was considered in the judgment under appeal that the fact that the plaintiff in 1925 demanded payment of the debt of Rs. 25,000 which bore a rate of interest of 6 per cent. per annum without demanding payment of the present debt which only bore a rate of 5¼ per cent. threw some doubt on the plaintiff's case.

Again the plaintiff was not asked about this and it would not be difficult to suggest reasons why a creditor might be willing to leave a larger sum outstanding even at a lower rate of interest if he were not dissatisfied with the credit of his debtor. It seems also to be overlooked that the difficulty, if difficulty there be, applies equally to the only other alternative view that there was a loan outstanding but that it was not payable on demand. That some arrangement was [172] made at the end of [172] 1919 accounting for the non-payment at the stipulated date and in succeeding years seems certain. In the careful judgment given on appeal the Court says: "Probably something did happen on the expiry of two years originally fixed, but what it exactly was we have no means of ascertaining on this record. There is something which neither party is willing to disclose." But the explanation given by the plaintiff is consistent with all the facts: the only counter-explanation was suggested to the plaintiff who was surely entitled to have an opportunity of meeting it if it is to be used against him. In all the circumstances of this case their Lordships come to the conclusion that there was no ground for reversing the decision of the trial Judge in favour of the plaintiff. The appeal should be allowed except as against defendants Nos. 2 and 3 and the decree of the Court of the Judicial Commissioner dated June 27, 1932, should be set aside: and the decree of the subordinate Judge dated October 15, 1931, should be restored. The appeal should be dismissed against the defendants Nos. 2 and 3 with costs and those defendants should also have their costs of the appeal against them in the Court of the Judicial Commissioner. The appellants should have the costs of the appeal against the other defendants here and in the Court of the Judicial Commissioner. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Stanley Johnson Allen; Nehra & Co.*

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[173] STRAITS SETTLEMENTS REPORTS [173]

PUBLISHED BY AUTHORITY

IN THE ESTATE OF LUM YOON KOW, DECD. LUM HOR CHOONG v. HEW LYE HEONG & LAM CHEOK TONG

[O.C.J. (Whitley J.) October 5, 1922]

[Penang Originating Summons No. 488 of 1921]

Practice — Removal of trustees — Allegation of breaches of trust — Whether order can be made on originating summons — Civil Procedure Code, s.68, (now Order LII, r.1).

The Court has no jurisdiction to make an order on an originating summons for the removal of trustees on grounds imputing breaches of trust.

SUMMONS IN CHAMBERS.

Saunders for the plaintiff.

A. K. á Beckett-Terrell for the 1st defendant.

Thornton for the 2nd defendant.

W. V. L. Van Someren for Lam Hor Phooi, a person having leave to attend proceedings.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Whitley J.: These proceedings were commenced by originating summons. Plaintiff, as one of the residuary legatees under the will of his father, Lum Yoon Kow, sued the defendants, as executrix and executor, respectively, and as trustees, under the said will, for certain accounts and for administration of the testator's estate. Subsequently one Lam Hor Phooi, the only other residuary legatee, obtained leave to attend the proceedings. From time to time orders were made on defendants requiring them to produce account books and vouchers for examination by plaintiff. On the 15th May, 1922, an order was granted for the usual administration account and enquiries to be taken and made and the 1st defendant was ordered to pay into Court certain monies which she alleged were in her hands.